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In The Supreme Court of the United States

IN RE: NED COMER; BRENDA COMER; ERIC HAYGOOD; BRENDA HAYGOOD; LARRY HUNTER; SANDRA L. HUNTER; MITCHELL KISIELWESKI; JOHANNA KISIELWESKI; ELLIOTT ROUMAIN; ROSEMARY ROUMAIN; JUDY OLSON AND DAVID LAIN,

Petitioners.

On Petition For A Writ Of Mandamus To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF

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INTRODUCTION

Do Petitioners have a clear right, secured by 28 U.S.C. §§ 46 and 1291, to have an appeal of a district court's final decision "heard and determined" by a court of appeals? The five judges below, ostensibly acting as the Fifth Circuit's "internal authority," effectively interpreted 28 U.S.C. § 46(c) to mean that an appeal shall be "heard and determined" either by (1) a panel, (2) an en banc court, or (3) no one. That interpretation raises constitutional problems.

Respondents sidestep these problems with several sophistic objections. Respondents concede that after the en banc court lost its quorum, the Fifth Circuit had options other than total dismissal that would have allowed Petitioners' appeal to be "heard and determined." But Respondents argue that dismissal was proper anyway. Respondents' arguments rely on logical errors and are plainly incorrect.

ARGUMENT

I. If the Fifth Circuit should have fulfilled its duty in some alternate way, then mandamus is still proper.

The parties do not dispute that Petitioners have a statutory right to an appeal. Instead, in briefing to the Fifth Circuit and to this Court, they have disagreed about the proper procedure once the circuit court lost its en banc quorum. Respondents' opposition to mandamus now raises a brand new, and

plainly illogical, argument. Respondents' new argument is this: if any procedure suggested by Respondents in its briefing to the Fifth Circuit was a *correct* procedure for deciding the appeal after a quorum was lost, then the Fifth Circuit was entitled to ignore all suggestions, including Respondents' allegedly *correct* procedure, and to dismiss the appeal without a determination, merely because Petitioners advocated a *different* procedure.

If the Fifth Circuit can choose some other method to hear and decide the appeal, then it must do so. Instead, the Fifth Circuit dropped the appeal altogether. Respondents quibble with Petitioners about the best remedy, but present no cogent argument that the Fifth Circuit ever heard and determined the appeal as required under the law. Thus mandamus is proper even if Respondents can suggest viable alternate remedies.

A. Petitioners did not dictate the Fifth Circuit's decision.

Respondents argue that Petitioners, by opposing Respondents' arguments, forced the five judges to dismiss the appeal. Accordingly, they argue, Petitioners should not be allowed to seek mandamus now:

> "Although Petitioners wrongly complain of an 'egregious breakdown of regular procedure,' they fail to recognize that they shaped that procedure by actively opposing every

> option Respondents suggested for allowing the appeal to proceed en banc."[1]

But *Respondents* also advocated zealously against every option *Petitioners* presented. The courts are not held captive when parties do not agree on a procedural issue. The courts are charged with resolving conflicts between parties. If party agreement were a prerequisite for an appellate court ruling, an appellant's right to appeal would be defeated unless he acquiesced to every procedural argument put forward by the appellee.

The Fifth Circuit, not the litigants, was responsible for making this decision. The five judges abdicated the circuit court's responsibility when they *sua sponte* dismissed the entire appeal. Only this Court, not Petitioners, is in any position to order circuit court judges to take any particular action to correct this mistake.

B. The rule of necessity applies only where extraordinary action is required to provide a necessary hearing.

Respondents argue that the rule of necessity can apply to lower courts and should apply in this case. However, Respondents erroneously conclude that the rule of necessity should apply to force a *discretionary* en banc rehearing.

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[1] *See* Brief in Opposition at 2.

To the extent that the rule of necessity applies in this case, it merely requires that the Fifth Circuit decide the appeal. Under 28 U.S.C. §§ 46 and 1291, *either* a panel *or* an en banc must hear and decide Petitioners' appeal, and usually cases are decided by panels only. That is exactly why the Rules of Appellate Procedure provide for senior judges, judges from other circuits, or district court judges to participate on appellate *panels* when *necessary*. It makes no sense to apply the "rule of necessity" doctrine to take extraordinary measures to force a *discretionary* en banc rehearing where the court lacks a quorum, when the properly constituted panel can simply rehear the case. Respondents inconsistently argue that the Fifth Circuit must apply the rule of necessity to complete the discretionary en banc rehearing, yet did not err in dismissing the entire appeal.

II. A quorum is a quorum, and not something less.

Respondents' argument that the quorum requirement in 28 U.S.C. § 46(c)-(d) can be read to allow less than half of the current active circuit judges to act as an en banc court is also illogical. More specifically, Respondents believe that the Fifth Circuit should interpret the quorum requirement in 28 U.S.C. § 46(c)-(d) to include specific language that was amended into Federal Rule of Appellate Procedure 35 in 2005. Respondents had originally supported this argument before the Fifth Circuit by analogizing to the National Labor Relations Board

("NLRB"), but the Fifth Circuit rejected these arguments. This Court should also reject them.

A. Respondents' reading would nullify the 28 U.S.C. § 46(c)-(d) quorum requirement.

First, the contested language simply is not found in 28 U.S.C. § 46(c)-(d), and courts should not add language into statutes that Congress has not chosen to include. Second, the 2005 Advisory Committee specifically negated this argument in their notes to Rule 35: "[t]he amendment to Rule 35(a) is not meant to alter or affect the quorum requirement of 28 U.S.C. § 46(d)." Third, this Court recently ruled in *New Process Steel, L.P. v. N.L.R.B.*[2] that the NLRB was wrong to ignore Congress's quorum requirement. Both the majority and the dissent in *New Process Steel* expressed the importance of following the 28 U.S.C. § 46 quorum statute as written by Congress.

Under Respondents' reading, the quorum requirement would be void. A vote of the majority of active judges who are not disqualified would be sufficient to grant en banc rehearing, and there would be no reason to even consider how many judges were able to participate in that vote. In other words, the courts would be required to comply *only* with Rule 35 and could simply ignore 28 U.S.C. § 46(c)-(d). This

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[2] 130 S.Ct. 2635 (2010).

would defeat the purposes of both 28 U.S.C. § 46(c)-(d) and the 2005 amendment to Rule 35.

B. Respondents' reading would also defeat the purpose of amending Rule of Appellate Procedure 35 in 2005.

Before the 2005 amendment, some circuits required an "absolute majority" of the active judges to *positively vote* for rehearing. Thus a disqualification essentially counted as a negative vote. In other words, if there are sixteen active judges in a circuit, and seven are disqualified, all nine non-disqualified judges must positively vote for rehearing en banc. Amending the language in Rule 35 resolved a circuit split and clarified that, in the example above, a positive vote of five of the nine participating judges would be sufficient. But this amendment did not do away with the quorum requirement that at least nine of the sixteen judges must be available to participate in the en banc court. In fact, doing so would counteract one of the very reasons that Rule 35 was amended:

> "Second, the absolute majority approach can leave the en banc court helpless to overturn a panel decision with which almost all of the circuit's active judges disagree. For example, in a case in which 5 of a circuit's 12 active judges are disqualified, the case cannot be heard en banc even if 6 of the 7 non-disqualified judges strongly disagree with the panel opinion. This permits one active

> judge – perhaps sitting on a panel with a visiting judge – effectively to control circuit precedent, even over the objection of all of his or her colleagues."[3]

The purpose here is to allow the majority of active judges to participate in rehearing a case and determining what the law will be in that circuit, and to allow a majority vote *of that group* to join in the order to grant en banc rehearing and in the en banc decision. This purpose can only be realized if the quorum requirement remains intact. Under Respondents' reading, if three judges on a panel were the only ones not disqualified, they could vote for en banc rehearing and affirm their own panel decision, giving it en banc precedential authority. This is not entirely farfetched, given the broad effects some current multiparty lawsuits are already having with respect to district court recusals. The quorum requirement is necessary to give proper effect to both Rule 35 and 28 U.S.C. § 46.

C. Mandamus is proper even if circuit courts can ignore the quorum requirement.

The five judges below simply lacked a quorum, and that also means that they lacked authority to dismiss the appeal, thus mandamus is proper because the five judges exceeded their authority. However,

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[3] Fed. R. App. P. 35, 2005 Advisory Committee Notes.

even if Respondents' reading were correct, then mandamus would *still* be proper. In that case, the eight unrecused judges should have ignored the quorum requirement, and issued an "en banc" decision on the appeal. Instead of either of these two outcomes, the five judges ruled that they lacked any authority to act and then dismissed the appeal.

III. Local rules and judicial convention cannot supersede statutes.

The argument above – that courts can reword a federal statute to include language from a procedural rule – demonstrates a larger problem in Respondents' general logic. Respondents argue that the five judges were justified in abrogating statutory duties and rights because they were constrained by their own local rules and judicial convention. But not all laws and rules have equal authority. Courts must honor first the U.S. Constitution, then U.S. statutes, then rules and regulations, then local rules, and only then judicial convention. Judicial convention, local rules, and even federal rules of procedure provide no excuse for violating statutory rights.

For example, Respondents can find no direct legal support for its idea that the panel irrevocably lost jurisdiction and hence can never reassert authority even if the en banc court's quorum dissipates. Respondents argue that their interpretation of 28 U.S.C.

§ 46(c) would support this theory,[4] yet § 46(c) says no such thing:

> "Cases and controversies shall be heard and determined by a court or panel of not more than three judges . . . , unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service. A court in banc shall consist of all circuit judges in regular active service, or such number of judges as may be prescribed in accordance with section 6 of Public Law 95-486 . . . "

Restricting "a court or panel" to three judges unless the en banc court hears the case is not the same thing as irrevocably divesting a panel of jurisdiction regardless of whatever happens later. Respondents also cite cases to support their argument that courts have traditionally read § 46(c) to mean that panels lose jurisdiction when an en banc court is convened. But these cases do not contemplate what should happen if the en banc court cannot actually rehear the appeal. Accordingly, they are not instructive here.[5]

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[4] *See* Certain Respondent's Brief in Opposition at 16.

[5] As a brief aside, a careful reading of § 46(c) invites the question in this particular case of how the en banc court could have properly ordered rehearing in the first place where a judge voted in February and then recused herself under "new circumstances" in April. The Court does not need to address this quandary, however, if it rejects Respondents' § 46(c) interpretation, because the problem the April recusal created can be corrected simply by sending the appeal to the properly constituted panel for rehearing.

Respondents' argument that the Fifth Circuit is so bound by its own local rules and traditions that it cannot meet its burden under 28 U.S.C. §§ 46 and 1291 runs contrary to the basic principals underpinning the rule of law in the United States. Even if there were a judicial convention that panels irrevocably relinquish jurisdiction when en banc is ordered, any such tradition must yield if it runs afoul of a statute. When courts follow local procedural rules and judicial conventions to the point of violating the clear language in statutes passed by Congress, this violates the separation of powers. A hierarchy of laws must apply here. Under that hierarchy, a federal statute trumps a local rule just as surely as the Constitution trumps a statute. If Fifth Circuit local rules conflict with federal statutes, the local rules must give way.

IV. Due Process requires drawing a distinction between a decision on a lawsuit's merits, and an appeal's merits.

Respondents contend that there was no due process violation here because some courts have dismissed cases without reaching the merits, or lacked power to act and therefore did not, and that these cases did not violate due process considerations. Their argument erroneously blurs important distinctions.

First, Petitioners have never asked the appellate court to decide the substantive merits of their case. Rather, Petitioners merely ask that the circuit court review the district court's decision on standing.

Second, the Fifth Circuit had jurisdiction over this appeal, and Respondents have not disputed this. Third, Respondents point out that appellate courts sometimes dismiss appeals without decisions in certain situations, such as when a litigant appeals an interlocutory decision or when a case becomes moot.[6] None of those situations apply here.[7] The Fifth Circuit's

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[6] An interesting and potentially relevant case on this issue is *Rangra v. Brown*, 584 F.3d 206 (5th Cir. 2009) (en banc), where elected officials challenged the Texas Open Meetings Act ("TOMA"). A Fifth Circuit panel issued a decision, then the en banc court granted rehearing, but while rehearing was pending a plaintiff left office and the en banc court *sua sponte* dismissed the appeal for mootness without an opinion. The Plaintiffs' appeal was totally dismissed and their panel decision had been automatically vacated by Local Rule 41.3. Nevertheless, *Rangra* now affects other litigants. Similarly situated plaintiffs immediately challenged the same TOMA issues in a new lawsuit, *Asgeirsson v. Abbott*, # 4:09-cv-00059-RAJ (W.D.Tx.). The district court in *Asgeirsson* must now determine how to interpret the panel decision's precedential effect where it was automatically vacated under Local Rule 41.3, yet it is the only pronouncement from the Fifth Circuit on the TOMA challenges. *See* Defs.' Proposed Findings of Fact & Conclusions of Law at 3-6, *Asgeirsson v. Abbott*, # 4:09-cv-00059-RAJ (W.D.Tx. filed 11/19/09) (Rec. Doc. 51); Pls.' Findings of Fact & Conclusions of Law at 2-3, *Asgeirsson v. Abbott*, # 4:09-cv-00059-RAJ (W.D.Tx. filed 11/22/09) (Rec. Doc. 52); Pls.' Brief on the Precedential Value of *Rangra v. Brown*, *Asgeirsson v. Abbott*, # 4:09-cv-00059-RAJ (W.D.Tx. filed 11/15/09) (Rec. Doc. 47).

[7] Respondents rely in vain on moot jurisprudence from the *Chrysler Corp. v. United States* cases. 314 U.S. 583 (1941) & 316 U.S. 556 (1942). In 1944, Congress amended the operative jurisdictional statute at issue in those cases, 15 U.S.C. § 29, thereby directing the courts to uphold quorum requirements yet ensure that parties maintain their rights to an appeal.

dismissal without a decision violated the Petitioner's due process rights.

V. When a circuit court has erred, there is no restriction on this Court's mandamus power.

Respondents imply that because this court rarely grants mandamus petitions, it should deny *this* mandamus petition.[8] This Court infrequently exercises original jurisdiction over mandamus petitions, but this fact neither restricts this Court's authority nor diminishes the importance of the unusual case where a circuit court is the subject of a mandamus request.

As decided in *Marbury v. Madison*,[9] the U.S. Supreme Court should not exercise original jurisdiction over most mandamus proceedings. Even writs of mandamus concerning the Vice President of the United States or district court judges should generally be brought in lower courts rather than in this Court. Furthermore, this Court only rarely needs to correct the circuit courts, because they seldom exercise jurisdiction where they should not or fail to exercise jurisdiction where they should. Additionally, even in the extraordinary case where

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[8] Brief in Opposition at 7, fn. 3.

[9] 5 U.S. (1 Cranch) 137 (1803).

original jurisdiction over a mandamus is arguably proper in this Court, parties infrequently request such relief. But that fact does not evidence some vague restriction on this Court's freedom to assert original jurisdiction when it is properly requested.

While litigants rarely request original mandamus relief from this Court, that fact alone does not dictate whether this Court may exercise power over this mandamus. In this case, only the U.S. Supreme Court is vested with authority to correct the circuit court's errors.

CONCLUSION

Where the appellees and the appellants disagree on a procedural issue, the circuit court cannot just throw up its hands and dismiss the entire appeal. Circuit courts must honor their statutory responsibilities to hear and determine cases. Respondents argue that their ideas about how to proceed were better than Petitioners'. Petitioners still disagree with this argument, because Respondents' solutions rely on logical fallacies and assume that procedural rules are as authoritative as statutes. Even if Respondents' procedural theories were better than Petitioners', mandamus is still proper because the Fifth Circuit dismissed the case instead of following any of these suggestions. Accordingly, Petitioners respectfully request that this Court grant this mandamus and order

the Fifth Circuit to restore Petitioners' appeal to the panel for rehearing and determination.

Respectfully submitted,

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